

IN THE DRAWINGS

Applicants acknowledge that the Examiner has accepted the drawings filed on July 24, 2001.

REMARKS

Claims 2-7, 9-11, 15, and 18-20 have been amended to address informalities. Claims 1-20 are pending in the present application.

As an initial matter, the Applicants object to the "finality" of the Office Action mailed July 13, 2005. The Examiner issued a first Office Action in this case on December 14, 2004, in which the Examiner rejected then-pending claims under 35 U.S.C. 103 as being unpatentable over Cambridge (U.S. 6,326,926) in view of Nadine (US 5,233,643) further in view of Berliner (US 6,731,908). In particular, the Examiner relied on Nadine to allegedly show the claimed feature of "out-of-band management communications." The Examiner did not rely on Berliner to show this feature. The Applicants filed a Response on March 9, 2005, highlighting the deficiencies in the Examiner's obviousness rejection. No material amendments were made by the Applicants to the claims in that Response. Subsequently, the Examiner issued the current Office Action, this time rejecting the claim on a different obviousness rejection. In particular, the Examiner relies on Berliner (instead of Nadine) to show the claimed feature of "out-of-band management communications." The Examiner's reliance on the different combination of references clearly constitutes a new rejection (as evidenced by the Examiner's advancement of a new motivation to combine in support of the obviousness rejection). However, despite making a new obviousness rejection, the Examiner unfortunately makes the current Office Action final. This is clearly improper, as the Applicants' amendments (or lack thereof) in the previous Response did not necessitate a new grounds for rejection. For this reason, the Applicants request the Examiner to withdraw the finality of the current Office Action.

Claims 1-3, 5, 18 and 19 are rejected under 35 U.S.C. 103(a) as being unpatentable over *Shoobridge* (U.S. 6,326,926) in view of *Berliner* (U.S. 6,731,908). Noting that *Shoobridge* at least does not disclose “conducting out of band management communications,” the Examiner turns to *Berliner* to supply this feature. *Berliner* is directed to a system for determining the distance between two wireless devices using an indirect propagation delay measurement. *Berliner*, col. 3, lines 31-34. *Id.* at col. 6:20-33. Indeed, it is the measurement of this distance that the Examiner alleges corresponds to the claimed feature of “conduction out of band management communications.” See Office Action, page 4.

The Applicants assert that the pending claims are allowable over the cited references. To establish a *prima facie* case of obviousness, three basic criteria must be met. First, the prior art reference (or references when combined) must teach or suggest all the claim limitations. Second, there must be some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to modify the reference or to combine reference teachings. Conclusory statements regarding common knowledge and common sense are insufficient to support a finding of obviousness. Third, there must be a reasonable expectation of success.

In the instant case, the Examiner fails to meet any of these criteria. As initial matter, the Examiner simply makes conclusory statements to support the obviousness rejection. There is no suggestion or motivation identified by the Examiner to combine the references in the manner suggested. Additionally, the Examiner fails to point to any reasonable expectation of success from the proposed combination.

Finally, the cited references, when considered alone or in combination, fail to teach one or more of the claimed features. Consider claim 1, for example. Claim 1, in part, calls for conducting management communications with the access point using said second wireless communications protocol. The Examiner, conceding that *Shoobridge* does not teach this feature, turns to *Berliner*, and argues that *Berliner* teaches a wireless device determining a distance between itself and another wireless device. But a wireless device determining a distance to another wireless device does not constitute conducting management communications with the access point (or any other device for that matter). Instead, it simply means that the wireless device has determined a distance to a remote device. In fact, the Examiner properly admits on page 7 of the Office Action that *Berliner* does not "disclose providing wireless management communications." Moreover, *Berliner* is completely silent as to an "access point," a term that is not only discussed but also never mentioned in *Berliner*. While *Berliner* makes a reference to a "base station" in Figure 2, *Berliner* clarifies that this so-called base station is simply one of the wireless devices, such as a telephone, PDA, etc. *Berliner*, col. 6, lines 20-25. As such, *Berliner* does not teach conducting management communications with the access point. For this reason, claim 1 and its dependent claims are allowable.

Independent claims 8 and 12 are rejected under 35 U.S.C. 103(a) as being unpatentable over *Berliner*. Claim 8 is directed to an access point that calls for a second radio module for providing wireless management communications, and Claim 12, in part, calls for allowing access to one or more management features of the apparatus. The Examiner admits that *Berliner* does not disclose wireless management communications. See Office Action, page 7. However, Examiner fails to provide any other reference to substantiate this §103 rejection. Because the

Office cites *no references* to support this "obviousness" assertion, the applicant infers that the Examiner makes this assertion based on personal knowledge. However, no supporting affidavit has been made of record. The applicant respectfully requests that prior art be provided to substantiate this "obviousness" assertion or that an affidavit be filed in accordance with 37 C.F.R. § 1.104(d)(2), which states (emphasis added):

(2) When a rejection in an application is based on facts within the personal knowledge of an employee of the Office, the data shall be as specific as possible, and the reference *must* be supported, when called for by the applicant, by the affidavit of such employee, and such affidavit shall be subject to contradiction or explanation by the affidavits of the applicant and other persons.

Consequently, the applicant respectfully and seasonably requests the Office to either (1) cite a reference in support of this position, or (2) provide a Rule 104(d)(2) affidavit from the Examiner supporting any facts within the personal knowledge of the Examiner, as also set forth in M.P.E.P. § 2144.03.

The Applicants respectfully traverse these rejections.

In view of the foregoing reasons, the Applicants request a Notice of Allowability.

If for any reason the Examiner finds the application other than in condition for allowance, the Examiner is requested to call the undersigned attorney at the Houston, Texas telephone number (713) 934-4064 to discuss the steps necessary for placing the application in condition for allowance.

Respectfully submitted,

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Date: 9/12/05

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